Triple Zest Trading & Suppliers & Ors v Applied Business Technologies Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-16–02 OF 2022(A)
ABDUL RAHMAN SEBLI CJ (SABAH AND SARAWAK), HASNAH HASHIM AND NORDIN HASSAN FCJJ
17 OCTOBER 2023

Moneylenders — Presumption of moneylending — Lender failed to rebut presumption he was moneylender — Moneylenders Act 1951 ('the MA'), s 10OA — Lender lent borrower RM800,000 on condition it was repaid in a month together with an equal amount as 'agreed profit' — Whether 'agreed profit' clearly fell under definition of 'interest' in s 2 of MA and raised presumption lender was carrying on business of moneylending — Whether Court of Appeal erred in holding lender could recover principal sum lent but not the 'agreed profit' — Whether lender could not recover any sum whatsoever as 'consideration' for the loan agreement was unlawful thus rendering agreement void under s 24 of Contracts Act 1950 ('the CA') — Whether lender could not rely on principle of restitution under s 66 CA to recover principal sum as s 66 only applied if contract became void or was discovered to be void and not when it was void ab initio

The first appellant ('A1') was a family-owned company whose directors were the second and third appellants ('A2' and 'A3'). A2 was the mother of A3 and one Mumtaz Shafinaz ('Mumtaz'). A2 and Mumtaz were the co-owners of two parcels of land ('the lands'). A1 needed funds for its business and approached the respondent ('R') — a general trading company dealing in petroleum products, construction works and information technology but which was not a licensed moneylender — for a RM800,000 loan. R agreed to lend the said sum provided it was repaid within one month together with a further RM800,000 as 'agreed profit'. In the loan agreement signed between the parties, A1 agreed to secure the loan by providing R with the personal guarantees of A2 and A3 that the loan would be repaid and depositing with R the title deeds to the lands together with four undated cheques, each for the sum of RM400,000, issued from A1's current account in favour of R. When A1 defaulted in repaying the loan, R sued the appellants and Mumtaz for, inter alia, an order that the lands be transferred to R; alternatively, an order that the lands be auctioned off to pay back the principal sum and 'agreed profit' owed to R. In their defence, the appellants pleaded that they never consented to the 'agreed profit' of RM800,000, that the entire transaction was an illegal moneylending transaction, that R exercised undue influence on A2 and A3 into signing the personal guarantees and that Mumtaz had nothing to do with

the loan agreement and had never pledged the lands as security for the loan. Following a trial, the High Court ordered the appellants to pay R the sum of RM1.6m (ie, the RM800,000 principal sum plus the 'agreed profit') but refused to order the transfer or auction of the lands because Mumtaz had nothing to do with the loan agreement and had never pledged the lands to R as security. Among other things, the High Court held that the transaction was not an illegal moneylending transaction as the evidence did not show that R had advertised or announced or held itself out in any way as carrying on the business of moneylending. The appellants appealed to the Court of Appeal ('COA') against the whole of the trial court's decision whilst R appealed against that part of the decision which refused to order the transfer or auction of the lands. In the COA, the appellants argued, inter alia, that although they had alleged in their pleadings that R was a moneylender — and thereby triggered the rebuttable presumption under s 10OA of the Moneylenders Act 1951 ('the MA') against R that it was a moneylender — R had never rebutted that presumption at trial. The COA, however, found that R had rebutted the presumption and that because R's loan to the appellants was a 'friendly loan' under which no interest ought to be chargeable, R was only entitled to recover the principal loan sum of RM800,000, but not the 'agreed profit' sum, together with interest thereon at 4% from the date of the High Court's judgment until date of realisation. The COA dismissed R's appeal and ordered it to return the title deeds of the lands to A2 and Mumtaz. The appellants were granted leave to file the instant appeal against the COA's decision on five questions of law, namely: (a) whether a loan agreement which charged a 100% interest rate on a loan which was to be repaid within 30 days was legal; (b) if such an agreement was illegal, whether the court should still assist the lender to recover the principal amount lent; (c) whether as long as a lender did not carry on, announce, advertise or hold himself out as carrying on the business of moneylending, he would not be defined as a moneylender even though he had lent money at an interest rate of 100% per month; (d) whether the MA only regulated moneylenders and if a person was found to be not a moneylender, he could lawfully enter into a loan agreement that charged any interest rate including interest at the rate of 100% per month; and (e) whether a person who was not defined as a moneylender could lend money at any interest rate.

Held, answering all the leave questions in the negative, allowing the appeal and setting aside the COA's decision:

(1) The decisions of the courts below in the instant matter were disturbing as they legitimised illegal moneylending. On the one hand, the High Court set the precedent that an unlicensed moneylender could lend money at 100% interest without being in breach of the Moneylenders Act 1951 ('the MA') — a proposition which was as untenable as it was dangerous

— whilst the Court of Appeal set the precedent that such a moneylender could recover the principal loan sum but not the interest (see paras 21–20 & 34).

(2) In coming to the conclusion that R was not carrying on the business of moneylending merely by entering into a single loan agreement with the appellants, the High Court judge erred in focusing too much on the meaning of 'moneylender' without regard to the meaning of 'moneylending' and 'interest' in s 2 of the MA when the three meanings had to be read together and harmoniously. The trial judge should have applied his mind to the meaning of 'interest' given in s 2 of the MA which was of crucial importance in determining whether R was carrying on the business of moneylending in its transaction with the appellants. The 'agreed profit' was the 'consideration' for the loan and was in fact and as a matter of law 'interest' within the meaning of s 2 of the MA as it was a sum that was 'by whatsoever named called in excess of the principal paid or payable to the moneylender'. Therefore, when R agreed to lend the RM800,000 to the appellants subject to it being repaid with another RM800,000 as 'agreed profit', it was carrying on the business of moneylending within the meaning of s 2 of the MA as it was 'lending money at interest, with or without security'. The RM800,000 'consideration' for the loan was nothing but 'interest' at the rate of 100% disguised as 'agreed profit'(see paras 16, 19, 36–37, 39 & 40–42).

(3) The trial judge committed a serious error of law when he failed to direct his mind to s 10OA of the MA which imposed on R the legal burden of proving on balance of probabilities that it was not carrying on the business of moneylending in its transaction with the appellants. The COA compounded that error by making its own finding of fact that R had indeed rebutted the said presumption on balance of probabilities when it found no evidence that R was engaged in the business of moneylending. This was another way of saying that the appellants had led no evidence at the trial to prove that R was carrying on the business of moneylending. This was wrong because under s 10OA of the MA, the burden was not on the appellants but rather on R to prove that it was not carrying on the business of moneylending (see paras 43–44 & 50–52).

(4) The presumption under s 10OA of the MA applied against R as a matter of law because the appellants had alleged in their pleadings that R was a moneylender. Failure to rebut the presumption had to lead to a finding that the presumed fact was true. To successfully rebut the presumption, R had to prove on balance of probabilities that it did not lend money at interest, with or without security, to the appellants. There was not a morsel of evidence adduced by R to show that the RM800,000 it lent the appellants was not lent at interest. In fact, the opposite was true in that

the evidence showed beyond a shadow of doubt that the loan carried an exorbitant interest rate of 100% which was cleverly described as 'agreed profit' (see paras 55–57).

(5) The disturbing precedent the COA set in this appeal was that an unlicensed moneylender could recover the principal loan sum but not the interest. This legitimised illegal moneylending by allowing illegal moneylenders to recover the principal loan amount in spite of the illegality of the transaction. If the court were to lend a helping hand to a person who charged exorbitant interest to claim back the principal amount lent, it would create a fertile breeding ground for illegal moneylenders aka 'Ah Long' because in the event the borrower did not repay, the principal loan sum was guaranteed to be recoverable through the court process. 'Ah Longs' would have nothing to lose. Their only loss, if at all it could be called a loss, was that they would not be able to enjoy the fruits of the exorbitant interest rates that they charged their borrowers (see paras 23 & 34).

(6) The trite principle was that a loss should lie where it falls when an agreement was found to be illegal. The 'agreed profit' in the instant case was caught by paras (a), (b) and (e) of s 24 of the Contracts Act 1950 ('the CA') in that it was a 'consideration' that was forbidden by law, was of such a nature that, if permitted, would defeat any law and was one which the court regarded as immoral or opposed to public policy. The unlawfulness of the 'consideration' thus rendered the loan agreement in the instant case void under s 24 of the CA. The court would not assist those who came before it with unclean hands and the remedy of restitution under s 66 of the CA would not avail such litigants. The remedy under s 66 was only available where the contract was discovered to be void or when it became void and not where it was void ab initio as was the case with the loan agreement in the instant case (see paras 26–28).

[Bahasa Malaysia summary

Perayu pertama ('P1') adalah sebuah syarikat milik keluarga yang pengarahnya merupakan perayu kedua dan ketiga ('P2' dan 'P3'). P2 merupakan ibu kepada P3 dan Mumtaz Shafinaz ('Mumtaz'). P2 dan Mumtaz adalah pemilik bersama dua bidang tanah ('hartanah tersebut'). P1 memerlukan dana untuk perniagaannya dan memohon bantuan responden ('R') — sebuah syarikat perdagangan am yang berurusniaga dengan produk petroleum, kerja-kerja pembinaan dan teknologi maklumat namun bukan pemberi pinjam wang berlesen — untuk satu pinjaman berjumlah RM800,000. R bersetuju untuk meminjamkan jumlah tersebut dengan syarat bayaran balik dibuat dalam tempoh satu bulan bersama RM800,000 lagi sebagai 'keuntungan yang dipersetujui'. Dalam perjanjian pinjaman yang ditandatangani antara kedua-dua pihak, P1 bersetuju untuk mendapatkan pinjaman dengan memberikan R jaminan peribadi P2 dan P3 bahawa pinjaman itu akan dibayar

balik dan surat hak milik hartanah tersebut didepositkan bersama empat cek tidak bertarikh, masing-masing dengan jumlah RM400,000, yang dikeluarkan dari akaun semasa P1 yang memihak kepada R. Apabila P1 gagal membayar balik pinjaman itu, R menyaman perayu dan Mumtaz, antara lain, untuk perintah bahawa hartanah tersebut dipindahkan ke R; sebagai alternatif, perintah bahawa hartanah tersebut dilelong untuk membayar balik jumlah prinsipal dan 'keuntungan yang dipersetujui' yang terhutang kepada R. Di dalam pembelaan mereka, perayu mengaku bahawa mereka tidak pernah bersetuju dengan 'keuntungan yang dipersetujui' sebanyak RM800,000, bahawa keseluruhan transaksi itu adalah transaksi pinjaman wang haram, R menggunakan pengaruh yang tidak wajar pada P2 dan P3 untuk menandatangani jaminan peribadi dan Mumtaz tidak terlibat dengan perjanjian pinjaman dan tidak pernah menjanjikan tanah sebagai cagaran untuk pinjaman itu. Selepas perbicaraan, Mahkamah Tinggi memerintahkan perayu membayar jumlah sebanyak RM1.6 juta (iaitu jumlah pokok RM800,000 ditambah dengan 'keuntungan yang dipersetujui') tetapi tidak memerintahkan hartanah tersebut untuk dipindahkan atau dilelongkan kerana Mumtaz tiada kaitan dengan perjanjian pinjaman dan tidak pernah menjanjikan hartanah kepada R sebagai cagaran. Selain itu, Mahkamah Tinggi memutuskan bahawa transaksi itu bukan transaksi pinjaman wang haram kerana kerana keterangan tidak menunjukkan bahawa R telah mengiklankan sebagai menjalankan perniagaan peminjam wang. Rayuan perayu kepada Mahkamah Rayuan ('MR') terhadap keseluruhan keputusan mahkamah perbicaraan manakala rayuan R terhadap sebahagian keputusan itu yang enggan mengarahkan pemindahan atau lelongan hartanah tersebut. Ketika prosiding di MR, perayu berhujah, antara lain, bahawa walaupun mereka telah menghujahkan bahawa R adalah peminjam wang — dan membangkitkan anggapan yang boleh ditolak di bawah s 10OA Akta Pemberi Pinjam Wang 1951 ('APPW') terhadap R bahawa mereka adalah peminjam wang — R tidak pernah membantah anggapan itu semasa perbicaraan. MR, bagaimanapun, mendapati bahawa R telah membantah anggapan itu dan oleh kerana pinjaman R kepada perayu adalah 'pinjaman mesra' di mana tiada faedah yang dikenakan, R hanya berhak mendapatkan semula jumlah pinjaman pokok sebanyak RM800,000, tetapi bukan jumlah 'keuntungan yang dipersetujui', bersama-sama dengan faedah pada 4% dari tarikh penghakiman Mahkamah Tinggi sehingga tarikh pelupusan kes. MR menolak rayuan R dan mengarahkannya mengembalikan surat hak milik tanah itu kepada A2 dan Mumtaz. Perayu diberi kebenaran untuk memfailkan rayuan ini terhadap keputusan MR atas lima persoalan undang-undang, iaitu: (a) sama ada perjanjian pinjaman yang mengenakan kadar faedah 100% ke atas pinjaman yang akan dibayar balik dalam masa 30 hari adalah sah; (b) sekiranya perjanjian sedemikian tidak sah, sama ada mahkamah perlu membantu peminjam wang untuk mendapatkan semula jumlah prinsipal yang dipinjamkan; (c) sama ada selagi peminjam wang tidak mengumumkan, mengiklankan atau meletakkan dirinya sebagai menjalankan perniagaan pemberi wang, dia tidak akan

dianggap sebagai peminjam wang walaupun dia telah meminjamkan wang pada kadar faedah 100% sebulan; (d) sama ada APPW hanya mengawal selia peminjam wang dan sekiranya seseorang didapati bukan peminjam wang, dia boleh memasuki perjanjian pinjaman yang mengenakan sebarang kadar faedah termasuk faedah pada kadar 100% setiap bulan; dan (e) sama ada seseorang yang tidak ditakrifkan sebagai peminjam wang boleh meminjamkan wang pada sebarang kadar faedah.

Diputuskan, sebulat suara menjawab semua persoalan undang-undang dengan negatif, membenarkan rayuan dan mengenepikan keputusan MR:

(1) Keputusan-keputusan di mahkamah bawahan dalam perkara ini adalah tidak wajar kerana ianya mengesahkan pinjaman wang haram. Dalam kata yang lain, Mahkamah Tinggi menetapkan duluan bahawa pemberi pinjam wang tidak berlesen boleh meminjamkan wang dengan faedah 100% tanpa menyalahi peruntukan Akta Pemberi Pinjam Wang 1951 ('APPW') — perkara ini tidak boleh dipertahankan kerana berisiko — sementara Mahkamah Rayuan menetapkan duluan bahawa pemberi pinjam wang itu boleh mendapatkan semula jumlah pinjaman pokok tetapi bukan faedah (lihat perengggan 20–21 & 34).

(2) Dalam membuat kesimpulan bahawa R tidak menjalankan perniagaan pinjaman wang hanya dengan memasuki satu perjanjian pinjaman dengan perayu, hakim Mahkamah Tinggi ketika menumpukan maksud 'pemberi pinjam wang' tidak mengambil kira maksud 'pemberi pinjam wang' dan 'faedah' di dalam s 2 APPW. Ketiga-tiga perkataan itu perlu dibaca bersama dan harmoni. Hakim perbicaraan sepatutnya menumpukan fikirannya kepada maksud 'faedah' di dalam s 2 APPW yang sangat penting dalam menentukan sama ada R menjalankan perniagaan pinjaman wang dengan perayu. 'Keuntungan yang dipersetujui' adalah 'balasan' untuk pinjaman dan sebenarnya adalah satu 'faedah' menurut undang-undang seperti yang diperuntukkan di dalam s 2 APPW kerana ianya adalah jumlah yang 'dengan apa jua namanya merupakan sesuatu yang melebihi prinsipal dibayar kepada pemberi pinjam wang'. Oleh itu, apabila R bersetuju untuk meminjamkan RM800,000 itu kepada perayu dengan bayaran balik dengan tambahan RM800,000 sebagai 'keuntungan yang dipersetujui', ianya menjadikan transaksi tersebut sebagai perniagaan pinjaman wang menurut s 2 APPW kerana ianya 'meminjamkan wang dengan faedah, dengan atau tanpa jaminan'. 'Balasan' RM800,000 untuk pinjaman itu adalah 'faedah' pada kadar 100% yang dikaburi sebagai 'keuntungan dipersetujui' (lihat perenggan 16, 19, 36–37, 39 & 40–42).

(3) Hakim perbicaraan melakukan kekhilafan undang-undang yang serius apabila beliau gagal mengambilkira peruntukan s 10OA APPW yang meletakkan beban undang-undang untuk membuktikan di imbangan

kebarangkalian bahawa mereka tidak menjalankan perniagaan pinjaman wang ketika memberi pinjaman kepada perayu. MR menambah kesilapan tersebut dengan membuat dapatan fakta sendiri bahawa R sememangnya membantah anggapan tersebut atas imbangan kebarangkalian apabila mendapati tiada keterangan di dapati bahawa R terlibat di dalam perniagaan pemberi pinjaman wang. Perayu juga dikatakan tidak mengemukakan keterangan ketika perbicaraan untuk membuktikan bahawa R menjalankan perniagaan pemberi wang. Ini adalah salah kerana di bawah s 10OA APPW, beban pembuktian adalah bukan pada perayu tetapi kepada R untuk membuktikan bahawa mereka tidak menjalankan perniagaan pinjaman wang (lihat perenggan 43–44 & 50–52).

(4) Anggapan di bawah s 10OA APPW yang diguna pakai terhadap R adalah perkara undang-undang kerana perayu telah memplidkan bahawa R adalah pemberi pinjam wang. Kegagalan untuk membantah anggapan itu menyebabkan fakta itu dianggap benar. Untuk membolehkan anggapan itu berjaya, R perlu membuktikan atas imbangan kebarangkalian bahawa mereka tidak meminjamkan wang dengan faedah, dengan atau tanpa cagaran kepada perayu. Tiada keterangan yang dikemukakan oleh R untuk menunjukkan bahawa RM800,000 yang dipinjamkan perayu tidak berserta dengan faedah. Malah, sebaliknya ada bukti melampaui keraguan bahawa bahawa pinjaman itu diberikan berserta kadar faedah yang terlalu tinggi, iaitu sebanyak 100% yang dinamakan sebagai 'keuntungan yang dipersetujui' (lihat perenggan 55–57).

(5) Perkara yang membimbangkan yang diputuskan oleh MR di dalam rayuan ini adalah peminjam wang tidak berlesen boleh mendapatkan semula jumlah pinjaman pokok tetapi bukan faedah. Keputusan ini mengesahkan pinjaman wang haram dengan membenarkan peminjam wang haram mendapatkan semula jumlah pinjaman pokok walaupun transaksi itu menyalahi undang-undang. Sekiranya mahkamah ini membantu seseorang mengenakan faedah yang terlalu tinggi untuk pinjaman pokok, ianya akan menggalakkan peminjam wang haram atau 'Ah Long' kerana sekiranya peminjam tidak membayar balik pinjaman tersebut, jumlah pinjaman pokok yang dijamin dapat diperoleh semula melalui proses mahkamah. 'Ah Long' tidak akan mengalami sebarang kerugian. Satu-satunya kerugian mereka, jika ianya boleh dipanggil kerugian, adalah bahawa mereka tidak dapat menikmati hasil dari kadar faedah yang terlalu tinggi yang dikenakan kepada peminjam mereka (lihat perenggan 23 & 34).

(6) Undang-undang menetapkan bahawa kerugian harus dipertimbangkan sekiranya perjanjian didapati menyalahi undang-undang. 'Keuntungan yang dipersetujui' dalam kes ini tertakluk kepada peruntukan di dalam

perenggan (a), (b) dan (e) s 24 Akta Kontrak 1950 ('AK') kerana ianya adalah 'balasan' yang dilarang oleh undang-undang dan jika dibenarkan, akan menyalahi mana-mana undang-undang dan merupakan salah satu yang dianggap oleh mahkamah sebagai sesuatu yang tidak bermoral atau bertentangan dengan dasar awam. 'Balasan' itu adalah salah di sisi undang-undang dan menjadikan perjanjian pinjaman dalam kes ini terbatal di bawah s 24 AK. Mahkamah tidak akan membantu mereka yang datang di hadapannya dengan tangan yang tidak bersih dan remedi pengembalian di bawah s 66 AK tidak boleh diguna pakai. Remedi di bawah s 66 hanya terpakai di mana kontrak itu didapati tidak sah dan bukan di mana ianya tidak sah secara *ab initio* seperti di dalam perjanjian pinjaman di dalam kes ini (lihat perenggan 26–28).]

Cases referred to

Dr Mansur bin Hussain & Ors v Barisan Tenaga Perancang (M) Sdn Bhd & Ors [2019] MLJU 1552, CA (refd)
Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara and another appeal [2020] 4 MLJ 93, CA (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd [1980] 2 MLJ 9; [1979] 1 LNS 60, FC (distd)
Tang Lee Hiok & Ors v Yeow Guang Cheng [2022] 5 MLJ 584; [2022] 1 LNS 1510, CA (refd)
Triple Zest Trading & Suppliers Sdn Bhd & Ors v Applied Business Technologies Sdn Bhd [2023] 2 MLJ 374; [2023] 1 LNS 102, CA (refd)
Yeow Guang Cheng v Tang Lee Hiok & Ors [2020] MLJU 1936; [2020] 1 LNS 1696, HC (refd)

Legislation referred to

Contracts Act 1950 ss 24, 24(a), (b), (e), 66
Financial Services Act 2013
Moneylenders Act 1951 ss 2, 5(1), (2), 10OA, 15

Appeal from: *Triple Zest Trading & Suppliers Sdn Bhd & Ors v Applied Business Technologies Sdn Bhd and another appeal* [2023] 2 MLJ 374

Hong Chong Hang (with Koay Jin Qian) (Hong Chew King) for the appellant.
Ahmad Hazrin bin Abdul Rahman (with Muzamil Aliff bin Mohamad) (Hazrin & Muzamil) for the respondent.

Abdul Rahman Sebli CJ (Sabah and Sarawak) (delivering judgment of the court):

[1] This appeal by the appellants is against the decision of the Court of Appeal allowing only in part their appeal against the decision of the High

Court ordering them to pay RM1.6m to the respondent by substituting it with an order that judgment be entered against the first and third appellants for a reduced sum of RM800,0000 together with interest at 4% from the date of judgment in the High Court to the date of realisation. The judgment of the Court of Appeal is reported in *Triple Zest Trading & Suppliers Sdn Bhd & Ors v Applied Business Technologies Sdn Bhd* [2023] 2 MLJ 374; [2023] 1 LNS 102.

[2] The appellants' case before this court is that they are not liable to pay any sum of money to the respondent, not even the principal loan sum of RM800,000 that the Court of Appeal ordered them to pay back to the respondent.

[3] Having given careful consideration to the submissions of the parties, both written and oral, we allowed the appellants' appeal with costs and set aside the decision of the Court of Appeal. These are our grounds for allowing the appeal.

[4] The facts are deceptively simple. The first appellant is a family-owned company whose business address is at No 3, Ground Floor, Lorong Kiara 1, Taman Kiara, 32020 Sitiawan, Perak and/or at C-06–05 Desa Putra, Jalan Wangsa Perdana 3, Wangsa Maju, 53300 Kuala Lumpur. The second and third appellants are its directors. The second appellant is also the mother of the third appellant and one Mumtaz Shafinaz ('Mumtaz') who is not a party to this appeal. At the trial in the High Court she was sued as the fourth defendant.

[5] The respondent is involved in the business of general trading, supplying petroleum products, construction works and information technology. Its registered address is at No 73A, Jalan SS 22/23, Damansara Jaya, 47400 Petaling Jaya, Selangor. It has no licence to carry on the business of moneylending.

[6] The narrative is that the first appellant required funds for its business and approached the respondent for a loan of RM800,000, which the courts below described as a 'friendly loan'. The respondent agreed, subject to the loan amount of RM800,000 being repaid with another RM800,000 as 'agreed profit'.

[7] Upon the signing of the loan agreement, the first appellant deposited with the respondent as collateral the title deeds to two parcels of land, four undated cheques in favour of the respondent each in the sum of RM400,000 from the first appellant's current account with a total value of RM1.6m. Personal guarantees were also provided by the second and third appellants guaranteeing repayment of the RM800,000 loan. The second appellant and Mumtaz are the co-owners of the two parcels of land.

[8] When the first appellant defaulted in repayment of the RM800,000 loan, the respondent sued the appellants and Mumtaz for, inter alia, the following reliefs:

(a) an order that the two parcels of land be transferred to it or, alternatively;

(b) the appellants pay back the amount owed amounting to RM1.6m (the principal loan sum of RM800,000 plus the 'agreed profit' of RM800,000) together with legal costs;

(c) if para (b) was allowed, an order to auction the two parcels of land to recover the amount owed by the appellants.

[9] In their defence to the suit, the appellants pleaded that they never consented to the 'agreed profit' of RM800,000, that the entire transaction was an illegal moneylending transaction, that the respondent exercised undue influence on the second and third appellants into signing the personal guarantees and that Mumtaz had nothing at all to do with the loan agreement and had never pledged the two parcels of land as security for the loan.

[10] Following a full trial, the High Court decided in favour of the respondent and ordered the appellants to pay the respondent the sum of RM1.6m with interest at 4% from the date of judgment until the date of full settlement. This judgment sum of RM1.6m was made up of the RM800,000 loan amount plus the 'agreed profit' of RM800,000.

[11] Of concern to this court is the finding by the learned trial judge that the RM800,000 loan with an 'agreed profit' of RM800,000 was not an illegal moneylending transaction for the reason that there was no evidence that the respondent was a 'moneylender' carrying on the business of 'moneylending'. In particular, it was the finding of the learned trial judge that there was no evidence that the respondent had held itself out as carrying on or advertising or announcing itself as 'carrying on the business of moneylending'.

[12] The finding was clearly on account of evidential deficit in the appellants' case rather than on the question of law as to whether or not the RM800,000 'agreed profit' was illegal.

[13] In arriving at such finding of fact, the learned trial judge laid emphasis on the fact that the appellants themselves had agreed to repay the principal loan sum of RM800,000 together with the 'agreed profit' of RM800,000 and that the respondent had not exercised undue influence over the first appellant's directors into executing the loan agreement and guarantees.

[14] As for the case against Mumtaz, the learned judge found, rightly in our

view, that the respondent had no cause of action against her as she had nothing to do with the loan agreement, and therefore the two parcels of land that she co-owned with the second appellant could not be transferred to the respondent. The respondent accepted the finding by not appealing against that part of the decision which favoured Mumtaz.

[15] The approach taken by the learned trial judge in dealing with the question of whether the respondent had engaged in an illegal moneylending transaction when it lent the RM800,000 loan to the appellants subject to repayment of another RM800,000 as 'agreed profit' can be seen from the following paragraphs of his grounds of judgment:

> 40. What is clear from the definitions above is that all roads lead to the definition of 'moneylender'. This court had scrutinised the testimony of the witnesses and found that there was no evidence that the plaintiff had ever held himself out as carrying on or advertising or announcing themselves as carrying on 'the business of moneylending'.
>
> 41. The uncontroversial fact remains that it was SD1 and SD3 that had gone to meet SP1 for a loan and not the other way around. In this context SP1 and SD3 had described themselves generally as business persons. SD1 and SD3 wanted desperately to borrow money for purposes of business on the terms and conditions as spelled out in the loan agreement. SP1 saw this as a profitable investment and therefore agreed to grant the loan. In my view there was nothing sinister about this. It is common among the business community to lend money, at the most advantageous of terms to the borrower, to those who desperately need money in order to alleviate the borrower's financial problems.
>
> 42. As the evidence shows, there is only one loan transaction conducted in this case, which is the subject matter in this case. In other words, there is no element of continuity or system or repetition of similar transactions as the word 'business' would suggest.
>
> 43. Thus, although SP1 was a businessman, he was not, however, in 'the business of moneylending' merely by entering into a single loan agreement with the first defendant. As the saying goes, 'one swallow does not make a summer'.

[16] The learned trial judge referred to the following provisions of the Moneylenders Act 1951 ('MA51') in coming to the conclusion that 'all roads lead to the definition of 'moneylender' and that the respondent was not carrying on the business of moneylending merely by entering into a single loan agreement with the appellants:

(a) s 5(1):

> (1) No person shall carry on or advertise or announce himself or hold himself out in any way as carrying on the business of moneylending unless he is licensed under this Act.

(b) s 15:

A No moneylending agreement in respect of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable.

(c) s 2:

B 'moneylender' means any person who carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending, whether or not he carries on any other business.

'moneylending' means the lending of money at interest, with or without security, by a moneylender to a borrower.

C 'moneylending agreement' means an agreement made in writing between a moneylender and a borrower for the repayment, in lump sum or instalments, of money borrowed by the borrower from the moneylender.

[17] At para 44 of the grounds of judgment, the learned judge reminded D himself of the precautionary words of the then Federal Court in *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd* [1980] 2 MLJ 9; [1979] 1 LNS 60 ('Gillespie Bros') where Salleh Abbas FJ (later LP) delivering the judgment of the court said:

E At the outset we wish to observe that the Moneylenders Ordinance 1951 does not apply to moneylending but only to moneylenders. It does not make every moneylending transaction illegal and unenforceable. It is only a moneylending transaction of a moneylender which is the subject-matter of the Ordinance and must comply with its provisions on pain of being declared illegal and unenforceable F by the court. We make this simple and obvious observation because it was canvassed very strongly before us by counsel for the appellants that since the transactions between the respondents and the client are moneylending transactions, the respondents must be a moneylender and the guarantee which the appellants signed is therefore unenforceable. This submission overlooks the fact that the party to a transaction who thereby becomes the creditor may or may not be a moneylender. G He is a moneylender if within the meaning of s 2 of the Ordinance he can be said to be a person 'whose business is that of moneylending'. *To prove business requires some sort of continuity or system or repetition of similar transactions*. (*Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] 1 MLJ 74 at p 77; [1960] 1 LNS 17; [1962] AC 209 at p 218). (Emphasis added.)

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[18] Then the learned judge went on to reason out at para 45:

45. I go further to say that it would be wrong to look at individual aspects of the transaction, for example, the 'agreed profit', the late payment interest, the cheques I and the land titles as indicating that the loan agreement was a money lending agreement. Looking at the transaction as a whole, including director's personal guarantees and that this was a 'one-off' affair, the said related collateral and securities were in furtherance of accommodating the first defendant's need to raise funds in the dire financial situation that it was in.

[19] Clearly the focus of the learned judge's attention was on the meaning of 'moneylender' without addressing his mind to the meaning of 'moneylending' given by s 2 of the MA51. For ourselves, we have no doubt that the respondent was 'carrying on the business of moneylending' as the RM800,000 that it lent to the appellants was lent at interest of RM800,000. We shall elaborate on this point later in this judgment.

[20] The precedent that the High Court set was that an unlicensed moneylender can lend money at 100% interest without being in breach of MA51.

[21] We must say with all due respect to the learned judge that the proposition is as untenable as it is dangerous. First of all, under s 5(2) of the MA51, any person who carries on the business of moneylending without a valid licence commits an offence and shall be liable on conviction to a fine of not less than RM200,000 but not more than RM1m or to imprisonment for a term not exceeding five years or to both fine and imprisonment and in the case of a second or subsequent offence shall also be liable to whipping.

[22] Going by the penalty provided for under s 5(2) of the MA51, the crime of moneylending without licence is by no means a trivial offence. We are mindful that we are not here dealing with a criminal matter but it goes to show how serious moneylending without licence is in the eyes of the law.

[23] We agree with learned counsel for the appellants that if the court were to lend a helping hand to a person who charges exorbitant interest to claim back the principal amount lent, it would create a fertile breeding ground for illegal moneylenders aka 'Ah Long' because in the event the borrower does not repay, the principal loan amount is guaranteed to be recoverable through the court process. Ah Longs would have nothing to lose. Their only loss, if at all it can be called a loss, is that they will not be able to enjoy the fruits of the exorbitant interest rates that they charged their borrowers, but that should matter little to them as they will get back their money in full.

[24] In the present case, not only was the respondent not punished for contravening s 5(2) of the MA51 but it was in some way given a helping hand by the court, albeit unwittingly. Without being derogatory, the decision of the courts below can be likened to allowing a robber to claim back his cost and expenses in a botched robbery attempt.

[25] It makes a mockery of MA51 and the Financial Services Act 2013. While banks and licenced moneylending companies need to obtain licences and abide by strict monetary regulations, unlicensed moneylenders need only to use the term 'agreed profit' in place of 'interest' as 'consideration' in carrying

on their illegal moneylending activities.

[26] This not only goes against the object of MA51 which is for the 'regulation and control of the business of moneylending, the protection of borrowers of monies lent in such business, and matters connected therewith' (see the preamble to MA51) but is also against the trite principle that a loss lies where it falls when an agreement is found to be illegal.

[27] Such an agreement is also void by statute. Under s 24 of the Contracts Act 1950 ('the Contracts Act'), an agreement is void if the object or consideration of the agreement is unlawful. The section reads as follows:

> 24 What considerations and objects are lawful, and what not
>
> The consideration or object of an agreement is lawful unless —
>
> (a) it is forbidden by law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[28] The consideration of RM800,000 as 'agreed profit' for the RM800,000 loan in the present case would be caught by paras (a), (b) and (e) of the above provision. The court will not render assistance to those who come before it with unclean hands and the remedy of restitution under s 66 of the Contracts Act will not avail such litigants. The remedy under that section is only available where the contract is discovered to be void or when it becomes void and not where it is void ab initio as is the case with the loan agreement in the present case. Section 66 of the Contracts Act is reproduced below:

> 66 When an agreement is *discovered to be void*, or when a contract *becomes void*, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. (Emphasis added.)

[29] We find as apt the general pronouncements of law made by the Court of Appeal in the following two cases and one by the High Court, although the context and factual matrix of the cases differ in material respects from the present appeal:

(a) *Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara and another appeal* [2020] 4 MLJ 93 (CA):

> Taking the argument on illegality point, it is trite that the effect of any illegal transaction will result in the 'loss lies where it falls'. A party that suffers loss due to an illegal contract, cannot sue the other contracting party to recover losses. The law will not afford relief to those who claim entitlements from an illegal act.

(b) *Dr Mansur bin Hussain & Ors v Barisan Tenaga Perancang (M) Sdn Bhd & Ors* [2019] MLJU 1552 (CA):

> Suffice for us to say here that if an agreement is void ab initio for illegality, no restitution can happen. No court will lend its hands to unwind a void agreement that was illegal ab initio by restoring each party to its original position as though the illegal agreement never took place.

(c) *Yeow Guang Cheng v Tang Lee Hiok & Ors* [2020] MLJU 1936; [2020] 1 LNS 1696 (HC) (affirmed by the Court of Appeal in *Tang Lee Hiok & Ors v Yeow Guang Cheng* [2022] 5 MLJ 584; [2022] 1 LNS 1510):

> To deter unlicensed moneylenders from continuing with their nefarious business, it is in the public interest for unlicensed moneylenders to be deprived of their illegal 'principal loan sums', interest and whatever ill-gotten property or benefit enjoyed from their unlawful moneylending business.

[30] Dissatisfied with the decision of the High Court, both parties appealed to the Court of Appeal — the appellants against the whole of the decision and the respondent against that part of the decision that disallowed the transfer of the two parcels of land or ordering the lands to be auctioned off to satisfy the debt.

[31] In the Court of Appeal, the appellants' argument was twofold: (1) that the learned judge erred in failing to consider that the respondent never rebutted the presumption under s 10OA of the MA51 that it was a moneylender; and (2) that the learned judge erred in holding that the loan agreement and guarantees were valid when the entire transaction contravened various provisions of MA51.

[32] In allowing the appellants' appeal in part, the Court of Appeal held that the appellants' liability was only to repay the principal loan sum of RM800,000 with interest at 4% from the date of the High Court decision until the date of realisation but not the 'agreed profit' of RM800,000 that the High Court had also ordered the appellants to pay to the respondent. The respondent's appeal on the other hand was dismissed in totality and it was further ordered to return the title deeds of the two parcels of land to the second appellant and Mumtaz within 14 days.

[33] From the grounds of judgment, it is clear that the decision of the Court of Appeal to allow the respondent to claim back the principal loan sum of

RM800,000 minus the 'agreed profit' of RM800,000 was premised on the following two grounds, one factual and the other legal:

(a) the respondent had adduced sufficient evidence to rebut the statutory presumption under s 10OA of the MA51 on the balance of probabilities; and

(b) in the case of a 'friendly loan' like the present case, no interest ought to be chargeable by the lender.

[34] The precedent that the Court of Appeal set was that an unlicensed moneylender can recover the principal loan sum but not the interest. Although less formidable than the precedent set by the High Court, the precedent set by the Court of Appeal is no less disturbing as it legitimises illegal moneylending by allowing illegal moneylenders to recover the principal loan amount in spite of the illegality of the transaction.

[35] Arising from the Court of Appeal decision, the appellants obtained leave to appeal to this court for the determination of the following questions of law:

(i) whether a loan agreement which charges an interest at the rate of one hundred (100%) percent within a period of 30 days is legal under the law?

(ii) if the answer to question (i) is illegal, whether the court should still assist the moneylender to recover the principal amount lent?

(iii) whether as long as a person who does not 'carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending', he will not be defined as a moneylender despite him lending money at an interest rate of 100% per month?

(iv) whether the Moneylenders Act 1951 only regulates moneylenders and if a person was found to be not a moneylender, he is at liberty to enter into loan agreement charging any interest rate including interest at the rate of 100% per month? and

(v) whether a person who is not defined as a moneylender can lend money at any interest rate?

[36] We have said in para 16 above that the learned trial judge referred to those provisions of MA51 in coming to the conclusion that the respondent was not carrying on the business of 'moneylending'. The learned judge should not have stopped at those provisions. He should have gone on to apply his mind to the meaning of 'interest' given by s 2 of the MA51, which is of crucial importance in determining whether the respondent was carrying on the

business of 'moneylending' when it lent the RM800,000 to the appellants with the 'agreed profit' of RM800,000.

[37] The word 'interest' is defined by s 2 of the MA51 as follows, and the context does not require otherwise:

> 'interest' does not include any sum lawfully charged in accordance with this Act by a moneylender for or on account of stamp duties, fees payable by law and legal costs but, save as aforesaid, *includes any amount by whatsoever name called in excess of the principal paid or payable to a moneylender in consideration of or otherwise in respect of a loan*. (Emphasis added.)

[38] This definition of 'interest' must be read into the relevant terms of the loan agreement in determining if the respondent was or was not carrying on the business of 'moneylending'. The relevant terms of the agreement are in the following clauses:

> 1. Loan Amount to the Borrower and Agreed Profit to the Lender.
>
> In consideration of the sum of Ringgit Malaysia Eight Hundred Thousand (RM800,000) only ('the Agreed Profit') which shall be payable by the Borrower to the Lender as the Agreed Profit to the Lender from this transaction, the Lender hereby agrees to lend and the Borrower hereby agrees to Borrow the sum of Ringgit Malaysia Eight Hundred Thousand (RM800,000) only ('the Loan Amount') to the Borrower on the terms set out hereunder.
>
> 2. Disbursement of loan to Borrower
>
> It is agreed between the Parties that disbursement of the Loan amount will not be made to the Borrower before the expiry of three (3) business days after the conclusion of this contract. During the said period of three (3) business days, the Borrower may terminate this contract at will. It is further agreed that the Lender shall not be entitled to interest for the period preceding the date upon which the Loan is disbursed to the Borrower.
>
> 3. Loan Period
>
> This loan shall endure for a period of thirty (30) days from the 23d of September 2016 to 22nd October 2016 ('the Loan Period') and shall thereafter be payable in whole by the Borrower to the Lender based on the terms set forth hereunder.
>
> 4. Repayment of Loan and Security for Repayment
>
> 4.1 The Borrower shall repay to the Lender the Loan Amount together with the agreed profit to the total of Ringgit Malaysia One Million Six Hundred (RM1,600,000) only ('the Repayment Amount') immediately upon cessation of the Loan Period or at any time prior to the cessation of the Loan Period;
>
> 4.2 The Borrower shall be required to deposit the following security to the Lender at the point of signing of this agreement:

(a) third party collateral in a form of two parcels of land ('the lands') described as:

(i) Lot PT 9952, Luas Lot 4694.3 Meter Persegi, Pasir Panjang, Mukim Setiawan, Daerah Manjung, Negeri Perak;

(ii) Lot PT 9951, Luas Lot 2018 Meter Persegi Pasir Panjang, Mukim Setiawan, Daerah Manjung, Negeri Perak, and

(b) Four (4) undated cheques issued from the Borrower's Current Account at the Amount of Ringgit Malaysia Four Hundred Thousand (RM400,000) only each, with a total value of Ringgit Malaysia One Million Six Hundred Thousand (RM1,600,000) only.

[39] So, by cl 1 of the loan agreement the 'agreed profit' of RM800,000 to be earned by the respondent was the 'consideration' for the RM800,000 loan. Read with cl 3, this 'agreed profit' of RM800,000 was in fact and as a matter of law 'interest' within the meaning of s 2 of the MA51, as it was a sum that was 'in excess of the principal paid or payable to the moneylender'.

[40] Therefore, when the respondent agreed to lend the RM800,000 to the appellants subject to payment of another RM800,000 as 'agreed profit', it was carrying on the business of 'moneylending' within the meaning of s 2 of the MA51 as it was 'lending money at interest, with or without security'.

[41] The 'consideration' of RM800,000 payable to the respondent at any time before or at the expiry of the agreement period of 30 days was nothing but 'interest' at the rate of 100% disguised as 'agreed profit'. By whatsoever label it was given, the RM800,000 was 'any amount by whatsoever name called in excess of the principal paid or payable to a moneylender'. If a rose by any other name would smell as sweet, a corpse flower by any other name would smell as foul.

[42] The error by the learned trial judge was in focusing too much on the meaning of 'moneylender' without regard to the meaning of 'moneylending' and 'interest' when the three meanings must be read together and harmoniously. This had led to an error of judgment by the learned trial judge on the issue of liability.

[43] The learned trial judge fell into another serious error of law when he failed to direct his mind to s 10OA of the MA51 which reads:

> Where in any proceedings against any person, *it is alleged that such person is a moneylender*, the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending until the contrary is proved. (Emphasis added.)

[44] It is a rebuttable presumption, a legal principle that presumes something to be true unless proven otherwise. Section 10OA of the MA51 imposed on the respondent the legal (as opposed to evidential) burden of proving, on the balance of probabilities, that it was not carrying on the business of 'moneylending' when it lent the RM800,000 to the appellants at a profit of RM800,000. The presumption is that it was carrying on the business of moneylending, 'until the contrary is proved'.

[45] As to what constitutes sufficient discharge of proving a case 'on the balance of probabilities', Lord Denning explained in *Miller v Minister of Pensions* [1947] 2 All ER 372:

> If the evidence is such that the tribunal can say 'We think it more probable than not' the burden is discharged, *but if the probabilities are equal, it is not*. (Emphasis added.)

[46] In the context of the present case, what it means is that if no evidence was led by either side on the question of whether the respondent was carrying on the business of moneylending, the burden of proof would not have been discharged by the respondent. Whether or not the respondent had succeeded in rebutting the statutory presumption under s 10OA of the MA51 is essentially a question of fact. But the court's finding must be based on hard evidence and not on conjecture unrelated to evidence.

[47] By not even addressing his mind to s 10OA of the MA51, it was not possible for the learned trial judge to have come to the right decision on the question of whether the respondent had succeeded in discharging its legal burden of proving that the single or 'one-off' loan that it gave to the appellants was not moneylending 'at interest'.

[48] With due respect to the learned judges of the Court of Appeal, by agreeing with the learned trial judge that the presumption of moneylending under s 10OA of the MA51 had been rebutted by the respondent on the balance of probabilities, they had not only perpetuated but had compounded the error committed by the learned High Court judge. There was no such finding of fact by the learned trial judge. This is how the Court of Appeal dealt with the matter at para [44] of its grounds of judgment:

> [44] On this issue, we agree with the High Court judge that as a matter of fact, the presumption of moneylending has been rebutted by the plaintiff. This is a case where the first defendant, the borrower, had sought out the plaintiff when it was in dire financial straits. The trial judge found that not a shred of evidence was adduced by the defendants in this case to show that the plaintiff had held itself out as carrying on or advertising or announcing themselves as carrying on 'the business of moneylending'. He also found that based on the testimony of witnesses, there was only a single loan transaction, which is the subject matter in this case. This led the trial judge to the conclusion *that there was no element of continuity or system or*

repetition of similar transactions to prove the 'business' of moneylending. (Emphasis added.)

[49] It was an affirmation by the Court of Appeal of the High Court's finding that there was no evidence that the respondent had held itself out 'in any way as carrying on or advertising or announcing itself as carrying on the business of moneylending' and that the loan agreement between the respondent and the appellants was a mere 'one-off' transaction, and hence the saying 'one swallow does not make a summer' that the learned High Court judge used to pigeon home the point.

[50] Having erroneously agreed with the learned trial judge that the respondent had succeeded in rebutting the presumption under s 10OA of the MA51, the Court of Appeal then proceeded to make its own finding of fact that the respondent had indeed rebutted the presumption on the balance of probabilities. It gave the following reasons for making such finding of fact at para [48] of the grounds of judgment:

> [48] We are of the view that even if the rebuttable presumption has arisen under s 10OA of the Act that the plaintiff is presumed to have carried on moneylending business, we find as a fact that plaintiff had adduced sufficient evidence to rebut this presumption on a balance of probabilities. The evidence of SP1 that the plaintiff was in the business of information technology is undisputed by the defendants. The loan agreement was with the plaintiff who carried on an information technology business. There is no evidence or sufficient proof before the trial court that the plaintiff was engaged in a moneylending business. There was also no evidence that the plaintiff had loaned money to borrowers in the past. In the absence of such evidence, we are of the view that the plaintiff had successfully rebutted the presumption under s 10OA.

[51] With due respect to the Court of Appeal, it fell into the same error as did the High Court when it found no evidence that the respondent was engaged in a moneylending business, which is another way of saying that the appellants led no evidence at the trial to discharge their burden of proving that the respondent was carrying on the business of moneylending.

[52] This is wrong because by the reversal of the onus of proof by s 10OA of the MA51, the burden was not on the appellants to prove that the respondent was carrying on the business of moneylending. Rather, the burden was on the respondent to prove to the contrary that it was not carrying on the business of moneylending.

[53] In our view, the error stems from the reliance by both courts below on *Gellespie Bros*. That was a case that was decided before s 10OA of MA51 was enacted and which only came into force on 15 April 2011 vide Act A1390.

That explains why, in the absence of such provision, the Federal Court in that case required evidence of 'some sort of continuity or system or repetition of similar transactions' before a person can be said to be carrying on the business of moneylending. The reliance by both the High Court and the Court of Appeal on the case was therefore misconceived and had misguided them into thinking that the burden was on the appellants to prove that the respondent was carrying on the business of moneylending.

[54] One thing for certain is that the Federal Court was not in that case called upon to decide on the effect of any statutory presumption like s 10OA of the MA51. That is the context in which the decision must be understood. It has no application to the factual matrix of the present case.

[55] The presumption under s 10OA of the MA51 applied against the respondent as a matter of law and not 'even if' it applied as implied by the Court of Appeal. It applied as a matter of law because it was alleged in the pleadings that the respondent was a moneylender. This automatically kicked in the presumption that the respondent was carrying on the business of moneylending 'until the contrary is proved'. Failure to rebut the presumption must lead to a finding that the presumed fact is true.

[56] To successfully rebut the presumption under s 10OA of the MA51, the respondent must prove on the balance of probabilities that by entering into the loan agreement with the appellants, it was not engaging in an act of 'lending of money at interest, with or without security, by a moneylender to a borrower', which is the meaning ascribed to the word 'moneylending' by s 2 of the MA51.

[57] In the present case, there is not a morsel of evidence adduced by the respondent to show that the RM800,000 that it lent to the appellants was not lent at interest. In fact the opposite is true in that the evidence shows beyond the shadow of a doubt that the RM800,000 loan carried an exorbitant interest rate of 100% which the respondent cleverly described as his 'agreed profit'. The respondent has indeed pushed profiteering to a new level.

[58] On the facts and the law applicable, our answers to the leave questions are as follows:

(a) leave question 1 — negative;

(b) leave question 2 — negative;

(c) leave question 3 — negative;

(d) leave question 4 — negative; and

(e) leave question 5 — negative.

[59] It was for all the reasons given that we allowed the appellants' appeal with costs of RM60,000 and set aside the decision of the Court of Appeal. My learned sister Justice Hasnah Mohammed Hashim and my learned brother Justice Nordin Hassan have read this judgment in draft and have agreed with it.

All leave questions answered in the negative; appeal allowed; and Court of Appeal's decision set aside.

Reported by Ashok Kumar